VOIP SERVICES USING INCUMBENT LOCAL EXCHANGE CARRIER (ILEC) FACILITIES TO ORIGINATE AND/OR TERMINATE TRAFFIC ARE SUBJECT TO ACCESS CHARGES

1. VOIP interexchange traffic that uses ILEC facilities to originate and/or terminate the VOIP call[1] in a non-IP format is end-to-end interstate or intrastate long distance (toll) voice telecommunications traffic.

- This VOIP traffic is a continuous communication without a net change in the form or content of the communication from the end user station to the terminating end user station.

- Based on Act definitions, and based on the FCC's 1998 Report to Congress, VOIP service using LEC facilities is "telecommunications" – "…the transmission, between and among points specified by the user, without change in the form or content of the information as sent and received."; and is a telecommunications service – "… the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." (Underlining added).

- The jurisdiction of a VOIP call using ILEC facilities is established by the station-to-station or end-to-end use of the telecommunications network facilities used to originate and terminate the call's usage.[2] For jurisdictional purposes, a call or message is not "terminated" until it reaches the intended called party at the distant end of the communications path. Thus, when the originator of a call and the intended called party are located in different states, the call is to be treated as interstate, regardless of the type of transport or the number and location of the intermediate switching central office points, modems, computers or routers and different carriers involved in the transport of a call. VOIP calls originated and/or terminated using ILEC facilities are interstate or intrastate interexchange (non-local) calls subject to access charges based on an end-to-end analysis.

- This VOIP is a telephone toll service (FCC Section 51.5) – A "…telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts for exchange service."

[1] VOIP calls originated by a computer (in IP format) or terminated by a computer (in IP format) are not included as part of this discussion.

[2] As the FCC stated in Docket 92-18, Memorandum Opinion and Order, Paragraph 12, Released February 14, 1992, footnotes deleted: "Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. 'The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.' '[J]urisdiction over, interstate communications does not end at the local switchboard. It continues to the transmissions ultimate destination.' 'The key issue in determining this question before us is the nature of the communications which pass through the facilities, not the physical location of lines.' *United States v. Southwestern Cable Co*., 392 U.S. 157, 168-9 (1968). As we have often recognized, this Commission's jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination.

As these FCC's Orders show, the fact that VOIP traffic simply uses IP transport does not make VOIP terminating traffic local, as AT&T claims.

2. Originating, transport and/or terminating facilities provided by ILECs or CLECs are an essential component of phone-to-phone, computer-to-phone or phone-to-computer VOIP service.

- None of AT&T's phone-to-phone voice services (whether transported via circuit switched or IP) could work without the facilities which interconnect the IP or circuit switched transport facilities of the long distance carrier to the originating or terminating customer.

- Likewise, even though there may be a net protocol conversion for IP originated and circuit switched terminated traffic (and for circuit switched originated and IP terminated traffic), access charges are still applicable for the use of the circuit switched facilities. These VOIP calls that use IP packet to originate or terminate and transport calls, do not allow the customer to utilize information (acquire, transform, process, retrieve, etc.) and thus are distinguishable from true information services. The IP protocol is simply packet switching, with no characteristics of information service, like those used in many non-VOIP telecommunications applications today.

3. The ESP or ISP access exemption does not apply to this traffic.

- This traffic is not enhanced nor is it an information service – There is no net change in the protocol nor is the service allowing customers to generate, acquire, store, transform, process, retrieve, utilize or make available information as required of an information service.[3] The means of transport whether circuit switched or IP does not transform voice telecommunications traffic to enhanced or information service traffic.

- The long distance provider is not acting as an ISP or ESP to allow the customer access to all of the sites and services on the Internet, but is simply using IP facilities (public or private) to transport voice telecommunications traffic originated and terminated using ILEC facilities.

- As a consequence, the ESP exemption does not apply and VOIP providers using ILEC facilities may not pay, in lieu of tariffed access rates, the local business line rate to terminate VOIP traffic.

- This service is no different than any other long distance telecommunications service and by applying access charges the Commission is not undermining the development of VOIP or exporting old regulatory structures into the new IP space.

4. ***Access does apply - VOIP traffic using ILEC facilities is an end-to-end interstate or intrastate long distance telecommunications service and therefore legally tariffed interstate or intrastate switched access charges (originating or terminating) are applicable.***

- Per FCC Part 69, Section 69.2(b) "Access service includes services and facilities provided for the origination and termination of any interstate or foreign telecommunication."

- Part 69, Section 69.5(b) provides that access charges "shall be computed and accessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."

- Access charges computed and filed in accordance with the Commissions rules (Part 69 of the FCC's rules and regulations) for interstate traffic or computed and filed in accordance with State Commission rules for intrastate traffic are applicable.

- Reciprocal compensation per FCC Section 51.221 is not applicable to this long distance VOIP telecommunications traffic because this traffic does not originate and terminate within the same local calling area.

5. ***The FCC should apply its long-standing policies to all long distance traffic that use ILEC facilities, including VOIP traffic.***

- In order to promote fair and economic competition among long distance providers, the Commission in CC Docket No. 78-72 established principles and rules that insured that all providers of interstate long distance voice telecommunications services (MTS, WATS, etc.) would, through the application of access charges, pay the same amount for the use of originating and terminating network facilities in order to:

  (a) Facilitate economic competition by insuring that all long distance providers and their services pay equivalent amounts for the use of ILEC facilities to originate, transport or terminate their long distance voice telecommunications calls. The Commission should not allow discrimination between similarly situated services (long distance services using IP transport and those using circuit switched transport).

  (b) Avoid uneconomic bypass. No long distance provider of voice telecommunications services should be allowed to gain a competitive advantage by obtaining facilities to originate or terminate their services at rates less than access charges (for instance through the use of local business line rate levels or reciprocal compensation).

  (c) Promote and maintain universal service by insuring that ILECs are fairly compensated for the use of their facilities to originate, transport and terminate long distance provider voice telecommunications calls.

- The Commission should continue to apply these principles, with the result that access charge rules are still applicable to all voice telecommunications traffic, including VOIP services that use ILEC facilities, irrespective of the means of transport (IP or circuit switched) selected by the long distance provider.

6. The Commission's 1998 Report to Congress did not alter the application of access charges to all long distance traffic that uses ILEC facilities, including VOIP.

- The report could not legally have changed the Commission's rules – it was neither a rulemaking nor a forbearance proceeding and there was no notice of a rule change.
- The report did not create an exemption for VOIP using ILEC facilities, but instead when discussing VOIP, which was at the time a new service, tentatively concluded that this traffic is telecommunications, and identified an issue (the application of access) that may need to be considered in the future

7. Requiring VOIP that use ILEC facilities providers to pay access charges:

- Will eliminate regulatory uncertainty. Uneconomic bypass and arbitrage will be eliminated and LECs will be provided with a legal opportunity to recover the costs of originating and terminating VOIP traffic. In addition, the carriers promoting and implementing VOIP will have a clear understanding of the compensation requirements associated with the deployment of their services.
- Will not deter deployment of new facilities and services by long distance providers - the 50% to 60% cost savings over the cost of circuit switching equipment[4] will incent long distance providers to install VOIP transport. Application of access charges will not stunt the growth of VOIP and stifle innovation and thus deprive consumers of the benefits of this technology. VOIP is no longer a nacient and emerging technology that is in need of an ISP or ESP like subsidy (exemption) to survive and grow.
- Will not cause VOIP providers using ILEC facilities to pay above cost, economically inefficient and non-cost based rates. If this was ever the case, the Commission's recent actions to reduce these charges for price cap and non-price cap ILECs should lay this tired argument to rest.
- Is not discriminatory. No competitive distortions will occur if switched access charges are applied to VOIP telecommunications that use ILEC facilities. All long distance providers will instead pay the same fee (access) for the use of ILEC facilities.
- Will not require VOIP providers to deploy costly and duplicate facilities if this long distance traffic is treated as access traffic. All that is required is that these providers properly include the CPN and route their voice long distance telecommunications for termination over existing access facilities.[5] No duplicate facilities and analysis of calls or packets are required.

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[4] "A Bright New Day for the Telecom Industry, if the Public Will Go Along" by Bernard Simon, Toronto, January 11, 2004, published in the New York Times on January 12, 2004.

[5] Big Planet et all, on page 19 of its comments in the AT&T proceeding asserts that there are privacy issues involved in passing the CPN, that the VOIP provider would need to ascertain the origination, destination and nature of each packet and that any anonymity and expectation of privacy would be lost. This assertion is a red hearing designed to elicit sympathy for the fraudulent practice of stripping the CPN so that the long distance provider can avoid legitimate charges. Long distance providers have passed the CPN for years with no concerns regarding the privacy of the originating caller. Further, for phone-to-phone IP voice calling, the VOIP provider does not, as Big Planet asserts, have any need to analyze packets. All that is required is to pass the CPN and route the voice telecommunication traffic for termination over access facilities

8. *"Taxation" of Internet services is not at issue*

- AT&T is only using IP protocol and/or the Internet to transport its interexchange telecommunications toll service calls.

- AT&T is not providing an Internet service but is simply using IP protocol to transport its interexchange telecommunications traffic. AT&T then uses ILEC public switched network facilities to further transport and terminate these calls to customers.

- Application of tariffed access charges for the use of non-Internet ILEC public switched network facilities is not a tax on Internet services as AT&T claims.

9. *AT&T's Petition is a straightforward case of using traffic misreporting and alternative routing by AT&T in order to attempt pay a lower local business rate or local reciprocal compensation rather than access charges for the use of ILEC facilities.*

- The best that can be said is that by inappropriately avoiding access tariff charges, AT&T is simply seeking a subsidy for its competitive interexchange toll service that is transported over IP protocol facilities.

- At odds with section 254(k) of the Act, that subsidy would flow from local exchange customers and other service providers (that would pay for the use of local exchange access facilities by AT&T) to AT&T's competitive toll service.

- AT&T's actions would harm universal service and for this reason alone the Act requires that AT&T's Petition be dismissed by the Commission.

- AT&T's actions, at worst are an unlawful attempt to avoid payment of legally tariffed access charges. AT&T is flagrantly and knowingly violating Commission rules.

- To allow AT&T's actions to continue is (a) Discriminatory, (b) At odds with the Act's requirement that all telecommunications providers contribute on an equitable basis to preserve and advance universal service because granting the petition would lower AT&T's payment; and (c) Would allow AT&T to use ILEC switched access services, but avoid legally filed and approved access rates for the service it used.

10. *The FCC should:*

- Deny AT&T's Petition; and,

- Immediately act to enforce its own rules and its approved access tariffs to require that AT&T and other VOIP providers using ILEC facilities to pay access charges for all interexchange telecommunications traffic, including phone-to-phone traffic transported over IP facilities. The longer the FCC waits to make a decision, the more difficult to resolve and costly the dispute will become; and,

- Require that interexchange phone-to-phone telecommunications traffic, whether transported over the public switched network or over the IP facilities, be routed for transport and termination over access facilities, as required in access tariffs, not local exchange facilities. No self reporting, as advocated, will be required and carriers will not be tempted to illegally masquerade their access traffic as local traffic, if this requirement of access tariffs is enforced.

- Allow ILECs to charge access prospectively and retrospectively. AT&T should not be allowed to profit from its scheme to avoid access payments by escaping retroactive payments for traffic that it knew was legitimately subject to access. There is no injustice in requiring retroactive payments because (a) AT&T knew its traffic was subject to tariffed originating and terminating access (in fact it paid originating access on this traffic) and (b) it had no legal basis not to pay access (the 1998 Report to Congress changed no rules).

Issues involving VOIP service originated and/or terminated in an IP format raised in the Vonage Petition and Pulver Petition, such as CALEA, universal service contributions and E-911, can be addressed in the upcoming VOIP NPRM.